

“Waters of the United States” Rulemakings & Litigation

ISSUE SUMMARY:

- Since 2015, the EPA and the Department of the Army (together, “the agencies”) have finalized multiple rules revising the regulatory definition of “waters of the United States” (WOTUS) under the Clean Water Act.
- Most recently, the agencies issued the “Navigable Waters Protection Rule: Definition of ‘Waters of the United States,’” 85 Fed. Reg. 22,250 (Apr. 21, 2020) (NWPR), which went into effect on June 22 in all states but Colorado pursuant to a district court order preliminarily enjoining the rule in that state.
- The agencies are actively defending the NWPR in ten district courts across the country. In addition, though most challenges to the prior regulatory definitions of WOTUS have been held in abeyance, at least two courts have ordered simultaneous briefing of the NWPR along with the agencies’ 2019 rule that repealed the 2015 regulatory definition of WOTUS and reinstated the pre-2015 regulatory regime.
- Thus far, merits briefing in the active WOTUS cases is scheduled to proceed from Fall 2020 to late Spring 2021.

UPCOMING MILESTONES:

- The agencies have briefs due over the coming months to defend the NWPR and the 2019 rule including in the following cases:
 - *California v. Wheeler*, No. 20-03005 (N.D. Cal.)
 - *Chesapeake Bay Found. v. Wheeler*, Nos. 20-01063 & 20-01064 (D. Md.)
 - *Colorado v. EPA*, No. 20-01461 (D. Colo.)
 - *Conservation Law Found. v. EPA*, No. 20-10820 (D. Mass.)
 - *Env’tl. Integrity Project v. Wheeler*, No. 20-01734 (D.D.C.)
 - *Murray v. Wheeler*, No. 19-01498 (N.D.N.Y.)
 - *Navajo Nation v. Wheeler*, No. 20-00602 (D.N.M.)
- Briefing on the NWPR in *S.C. Coastal Conservation League v. Wheeler*, No. 20-01687 (D.S.C.) concluded on Oct. 19.
- Oral argument in the agencies’ appeal of the Colorado district court’s order granting a preliminary injunction against the NWPR is scheduled for November 18 in the Tenth Circuit.
- Motions to preliminarily enjoin the NWPR remain pending in two cases: *N.M. Cattle Growers’ Ass’n v. EPA*, No. 19-00988 (D.N.M.) and *Wash. Cattlemen’s Ass’n v. EPA*, No. 19-00569 (W.D. Wash.).

BACKGROUND:

The term “waters of the United States” establishes the geographic scope of federal regulatory jurisdiction under the Clean Water Act. Specifically, Clean Water Act regulatory programs address “navigable waters,” defined in the statute as “the waters of the United States, including the territorial seas.” Over the past five decades, EPA and the Army have issued multiple regulations interpreting this statutory phrase.

In 2015, the agencies issued the “Clean Water Rule: Definition of ‘Waters of the United States,’” 80 Fed. Reg. 37,054 (June 29, 2015) (2015 Rule), which revised the agencies’ longstanding, 1980s-era regulatory definition of “waters of

the United States.” Upon publication, the 2015 Rule was immediately subject to legal challenges and never went into effect nationwide.

Following a February 2017 Executive Order regarding “waters of the United States,” the agencies undertook a two-step rulemaking process to review and revise the 2015 Rule. In “Step One,” the agencies proposed to repeal the 2015 Rule and reinstate the pre-2015 Rule regulations. Definition of “Waters of the United States”—Recodification of Preexisting Rule, 82 Fed. Reg. 34,899 (July 27, 2017); Definition of “Waters of the United States”—Recodification of Preexisting Rule, 83 Fed. Reg. 32,227 (July 12, 2018) (supplemental notice of proposed rulemaking). In “Step Two,” the agencies proposed a revised definition of “waters of the United States.” Revised Definition of “Waters of the United States,” 84 Fed. Reg. 4154 (Feb. 14, 2019).

The agencies finalized the “Step One” rule in Fall 2019, and it became effective on December 23, 2019. 84 Fed. Reg. 56,626 (Oct. 22, 2019) (2019 Rule). The agencies then finalized the “Step Two” rule—the Navigable Waters Protection Rule—in January 2020. 85 Fed. Reg. 22,250 (Apr. 21, 2020). The NWPR went into effect on June 22, 2020, except in the state of Colorado where a preliminary injunction applies.

The agencies are defending the NWPR in nearly a dozen cases brought by a variety of plaintiffs including states, tribes, environmental coalitions, trade groups, and landowners. Some of these lawsuits were filed in courts that are also reviewing challenges to the 2015 and 2019 Rules, and some have been filed in separate courts.

KEY EXTERNAL STAKEHOLDERS:

- ☒ Congress
- ☒ Industry
- ☒ States
- ☒ Tribes
- ☒ Media
- ☒ Other Federal Agency
- ☒ NGO
- ☒ Local Governments
- ☐ Other (name of stakeholder)

MOVING FORWARD:

- Proceeding with defending the cases.

LEAD OFFICE/REGION: WATER LAW OFFICE, OGC

OTHER KEY OFFICES/REGIONS: OW/OWOW

